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INTRODUCTION

Judith Nathanson is a lawyer in private practice. She has made a decision to represent only women in divorce cases, although she represents men in other matters. After seeking her services and being refused because of his gender, Joseph Stropnicky filed a complaint with the Massachusetts Commission Against Discrimination ("MCAD").[1] Following a hearing, the MCAD found Ms. Nathanson liable on the grounds that her practice is discriminatory.

There is no question that Ms. Nathanson discriminated, in that she chose her clientele based on gender. The question before the MCAD, and being discussed in this Symposium, is whether that particular form of discrimination is, or ought to be, unlawful. Most of us discriminate, one way or another, several times a week, at least. We decide which individuals to invite to a party, which colleagues with whom we will have lunch, which doctor or carpenter or shoemaker to patronize. All of these are discriminatory acts, in that we are choosing to associate or do business with one person or several persons, instead of others. But most of them are not unlawfully discriminatory acts, either because the basis of the discrimination is permissible (this shoemaker does better work than the other, for example), or because the circumstances are simply not covered by law. Even if I deliberately choose to invite no people of color, or only people of color, to a party at my house, unless my house has become a place of public accommodation (and thus within the

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1. *See* Stropnicky v. Nathanson, 19 M.D.L.R. (Landlaw, Inc.) 39 (MCAD Feb. 25, 1997).

scope of state law[2] or Title II[3]) or unless I am acting under color of state law (and thus within the scope of the Fourteenth Amendment[4] and Section 1983[5]), those choices are not legally redressable.

Many issues relating to the practice of law raise concerns about treating a law office as a place of public accommodation and thus subject to the statute. In addition, a First Amendment defense could be offered regarding a lawyer's choice of clients. But those are concerns I leave to my colleagues. Assuming, for the sake of argument, that the Massachusetts statute applies to this situation, a significant issue still exists: whether the choice of clientele by Ms. Nathanson ought to be treated as unlawful discrimination. In making that determination, one could approach the situation positively or normatively. That is, one could ask whether, under the current understanding of the law of discrimination, as defined largely by the United States Supreme Court, Ms. Nathanson's policy is illegal. Or, taking a normative approach, one could ask whether, looking at various feminist approaches to the law, her practices *should be* illegal.

I. THE LAW REGARDING DISCRIMINATION

A. *The Standard for Gender Discrimination*

Just as in the early race cases, in the late 19th century, in which the Supreme Court upheld the concept of separate spheres for different races,[6] the early cases also approved of separate spheres for men and women, as in *Bradwell v. Illinois*,[7] which upheld the exclusion of women from the practice of law. Beginning in the early 1970's, however, the Supreme Court reversed course and began to strike down laws that discriminated on the basis of sex.[8] Unlike the race cases, however, in which the Court quickly settled on a stan-

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2. *See* MASS. GEN. LAWS ch. 272, § 98 (1996); *see also* Welsh v. Boy Scouts of Am., 993 F.2d 1267 (7th Cir. 1993).

3. *See* Civil Rights Act of 1964, Tit. II, 42 U.S.C. §§ 2000a-2000a-6 (1994).

4. U.S. CONST. amend. XIV.

5. *See* 42 U.S.C. § 1983 (1994).

6. *See* Plessy v. Ferguson, 163 U.S. 537 (1896), *overruled by* Brown v. Board of Educ., 347 U.S. 483 (1954).

7. 83 U.S. (16 Wall.) 130 (1872).

8. *See, e.g.*, Taylor v. Louisiana, 419 U.S. 522 (1975) (striking down a Louisiana law that excluded women from jury service); Frontiero v. Richardson, 411 U.S. 677 (1973) (rejecting a federal law that made it easier for a serviceman to claim his wife as a dependent than it was for a similarly situated woman to claim her husband as a dependent); Reed v. Reed, 404 U.S. 71 (1971) (striking down an Idaho law giving men a preference over women in the administration of intestate estates).

dard of review,[9] it took some time before the Court established the appropriate standard in gender cases,[10] finally resolving the issue in *Craig v. Boren*,[11] in which the Court held that, "[t]o withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to . . . those objectives."[12]

The level of review described in *Craig* is usually referred to as intermediate scrutiny. It is neither as difficult for the government to defend its actions as is strict scrutiny, used in cases dealing with race, nor as difficult for the plaintiff to argue as is the rational basis test.[13] Instead, each case involving gender discrimination tends to be fairly fact specific, and has been used both to uphold laws that discriminate on the basis of gender,[14] and to strike them down.[15] In some ways gender cases are different from those involving other groups that have suffered discrimination. Despite a long history of exclusion from public life and from equal participation in the economic life of the country, many statutes and government practices were passed to protect women, and cases involving gender discrimination are as often brought by men as by women.[16] One of the factors that the Court has looked at in these cases is the issue of whether the statute or practice in question has been one that perpetuated stereotypes of gender roles.[17]

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9. *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954) (rejecting the doctrine of separate but equal); Korematsu v. United States, 323 U.S. 214 (1944) (upholding Japanese exclusion but applying strict scrutiny).

10. *See, e.g.*, *Frontiero*, 411 U.S. at 691-92 (disagreeing on whether the Court should use strict scrutiny or some lesser, but still heightened, standard of review).

11. 429 U.S. 190 (1976).

12. *Id.* at 197.

13. The rational basis test is used when the group in question has not been defined as discrete and insular, as described in the famous footnote 4 in *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938), and when the right involved has not been defined as fundamental, *see* Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985).

14. *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57 (1981); Michael M. v. Superior Court, 450 U.S. 464 (1981).

15. Most recently, the Court rejected the exclusion of women from the Virginia Military Institute, a public school. *See* United States v. Virginia, 116 S. Ct. 2264 (1996).

16. In *Craig*, for example, the challenged statute allowed women to purchase beer at the age of eighteen, while men were not allowed to purchase beer until the age of twenty-one. *See Craig*, 429 U.S. at 191-92; *see also* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 733 (1982) (striking down the exclusion of men from a nursing program at a state school); *Michael M.*, 450 U.S. at 469 (1981) ("[T]his Court has consistently upheld statutes where the gender classification . . . realistically reflects the fact that the sexes are not similarly situated in certain circumstances.").

17. *See, e.g.*, Orr v. Orr, 440 U.S. 268 (1979) (striking down an Alabama statute

B. *Affirmative Action*

Because traditionally state practices have discriminated both against and in favor of women, it makes the determination of whether a statute is intended as remedial, and therefore more likely to be upheld, more difficult. Nonetheless, the Court has been willing to uphold gender classifications that benefit women when they are designed to remedy past discrimination.[18] Most of the challenges to affirmative action programs have been in cases involving race. In *Adarand Constructors, Inc. v. Pena*,[19] the Supreme Court held that the standard that applies when practices or statutes disfavor a racial or ethnic group that has been the subject of discrimination also applies when statutes or practices are designed to benefit a previously disadvantaged group.[20] In other words, it is not discrimination against a racial or ethnic minority that triggers strict scrutiny, but the use of racial or ethnic classifications for whatever purpose. As the Court held in *Adarand*, "federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest."[21] What the Court has not yet made clear is what arguments the government could make to meet the standard, although there is clearly a split on that issue.[22]

If, therefore, the Court were to apply the same symmetry in gender cases that it does currently in race cases, the test for remedial actions, those designed to remedy past discrimination, would be mid-level scrutiny, just as it is used to determine whether an action discriminates against women. In other words, it should be easier to persuade the Court to uphold affirmative action programs aimed at women than those aimed at racial or ethnic groups. The analysis is not completely apposite, of course, because Ms. Nathanson's acts were private, and therefore were not covered by the Con-

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that allowed the award of alimony to women but not men, on the ground that it perpetuated the stereotype that men supported their wives and that wives were always economically dependent on their husbands but not the other way around).

18. *See, e.g.*, Califano v. Webster, 430 U.S. 313 (1977) (upholding a provision of the Social Security Act that calculated benefits in a way that was more advantageous to women).

19. 515 U.S. 200 (1995).

20. *See id.* at 227-29.

21. *Id.* at 235 (citation omitted).

22. Justice O'Connor, writing for the plurality in *Adarand* stated that strict scrutiny was not necessarily fatal in fact, *id.*, while Justice Scalia took the position that the Government could never use racial classifications to remedy past discrimination, *id.* at 236 (Scalia, J., concurring in part and concurring in the judgment).

stitution in any event. On the other hand, the Court by and large has applied the same standards in constitutional cases and acts of private discrimination, or affirmative action, that were covered by federal law.[23] If, therefore, Ms. Nathanson were to argue that the statute ought not to apply, because her restricted practice was in fact an act of affirmative action, meant to redress discrimination against women, she might have a good claim.

C. *The Standard as Applied*

In the constitutional claim, the test in a mid-level scrutiny case is whether the state can show that the classification in question serves an important government objective, and whether the classification is substantially related to that objective.[24] Translating that test into the private context, the question would be whether Ms. Nathanson can show an important objective that is substantially related to the discrimination she engages in. Based on the evidence concerning the results of divorce on the status of women,[25] and the fact that over the years she herself has found that women's experiences and roles during marriage make it necessary to make different arguments at the time of divorce, it would appear that she can meet that test.

The most relevant recent case appears to be *Mississippi University for Women v. Hogan*,[26] in which the Supreme Court ruled that restricting a nursing program at a state school that had been established solely for women violated the constitutional rights of a male applicant to the program.[27] The basis for the decision was the rejection of the state's claim that the restriction was an affirmative action measure. Instead, the Court found that the exclusion was

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23. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 287 (1978) (holding that the case could be determined under Title VI of the 1964 Civil Rights Act, although since the University of California is a state institution, the Fourteenth Amendment was also applicable); *see also* Johnson v. Transportation Agency, 480 U.S. 616 (1987) (upholding gender based affirmative action program under Title VII, based both on statutory and Constitutional precedent).

24. *See* Craig v. Boren, 429 U.S. 190, 197 (1976).

25. *See* LENORE J. WEITZMAN, THE DIVORCE REVOLUTION 323 (1985). Although Weitzman's methodology has been criticized, *see, e.g.*, Saul D. Hoffman & Greg J. Duncan, *What Are the Economic Consequences of Divorce?*, 25 DEMOGRAPHY 641 (1988), most studies support her basic conclusion, that women suffer economically as a result of divorce, *see, e.g.*, James B. McLindon, *Separate but Unequal: The Economic Disaster of Divorce for Women and Children*, 21 FAM. L.Q. 351, 352 (1987); Heather R. Wishik, *Economics of Divorce: An Exploratory Study*, 20 FAM. L.Q. 79 (1986).

26. 458 U.S. 718 (1982).

27. *See id.* at 730.

not necessary to compensate for past discrimination;[28] and, indeed, the exclusion itself perpetuated stereotypes about the role of women.[29] Finally, it was clear that the exclusion significantly disadvantaged Hogan and would have required him to attend a program at a considerable distance from where he lived and worked.[30]

The circumstances of this case are very different. There is no evidence that Mr. Stropnicky was unable to secure a lawyer to represent him. Apparently, when Ms. Nathanson declined his case, he did not seek another attorney and executed the divorce agreement without having it reviewed.[31] Furthermore, although women have traditionally found attorneys to represent them in divorce cases, if, in fact, women are economically disadvantaged as a result of divorce, there is a good argument to be made that they need specialized services from someone committed to the specific issues that arise in their regard. Rather than perpetuating stereotypes, such representation simply treats women as unique and treats their contributions to marriage as meaningful.[32]

II. Normative Standards: The Feminist Approach

Again, assuming that the law should apply at all, most feminists presumably would object to the practice of a lawyer who restricted his or her clientele to men, just as we would be offended by a lawyer who refused to represent people of color. But one of the questions this case raises is the issue of what we might call parity in antidiscrimination law, otherwise known as the test of whether what's good for the goose is good for the gander.

Virtually no one believes in absolute parity; that is, that women should always be treated precisely the same as men and that people of color should always be treated precisely the same as whites. At a minimum, when acts of discrimination by government or industry have been demonstrated, remedial action to redress that wrong, even if it temporarily gives an advantage to employees or job appli-

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28. *See id.* at 727-28.

29. *See id.* at 729-30.

30. *See id.* at 723-24 & 23 n.8.

31. *See* Stropnicky v. Nathanson, 19 M.D.L.R. (Landlaw, Inc.) 39, 40 (MCAD Feb. 25, 1997).

32. An argument can be made that because Mr. Stropnicky allegedly had maintained an untraditional role in his marriage, more like the traditional position that women have generally held, Ms. Nathanson could have represented him consistently with her goals. If, nonetheless, she believes that even men who occupy traditional female roles do better at the time of divorce or at reentering the job market, her original position is not inconsistent.

cants of color is acceptable even to the most conservative members of the Supreme Court.[33] Many people would go further than that and allow remedial action to achieve a more integrated work place or educational institution even without a showing of past purposeful discrimination.[34]

On the other hand, many people, including some feminists, would take the position that other than redressing past discrimination, or imbalances in the representation of women and people of color in institutions, everyone should be treated as similarly as possible. That position almost certainly would support the finding of the MCAD, that Ms. Nathanson was engaging in impermissible discrimination when she restricted her divorce practice to women, unless, perhaps, she could show that women had a more difficult time securing representation, in which case her position might be defined as remedial.

Many feminists would, however, disagree with the decision of the MCAD. The issue is not whether women have been unable to secure representation, but whether Ms. Nathanson believes women have different needs in divorce cases, that they need a particular *kind* of representation, which she is more capable of providing, or even simply more interested in providing. Some lawyers, for example, only represent plaintiffs in tort cases, while others are more comfortable representing defendants. Most labor lawyers represent either unions or employers, but rarely represent both. In the criminal law field, one either acts as a criminal defense lawyer or a prosecutor, but rarely in both capacities at the same time. The difference here, of course, is that sex discrimination is prohibited by law, whereas refusing to act for a cigarette company is not. But maybe the two situations have more in common than it would initially appear.

A. *The Equal Treatment Approach*

Although it is always risky to generalize, and feminist legal theory has multiplied in recent years and ventured into wide-ranging analyses of the law,[35] it is possible to divide feminist jurisprudence

33. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in the judgment).

34. *See, e.g.*, Sheff v. O'Neill, 678 A.2d 1267 (Conn. 1996).

35. *See, e.g.*, Leslie Bender, *An Overview of Feminist Torts Scholarship*, 78 CORNELL L. REV. 575 (1993); Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice*, 77 CORNELL L. REV. 1398 (1992); Martha Albertson Fineman, *The Neutered Mother*, 46 U. MIAMI L. REV. 653 (1992).

into roughly three different categories. Probably the first group, historically, consists of what are usually called equal treatment feminists, or those who take the position that as much as possible the law should treat men and women the same.[36] Wendy Williams, one of the leading proponents of this position, has argued that women should reject laws that provide special benefits for pregnancy just as they would object to those that discriminate against pregnancy. She argues that

> the same doctrinal approach that permits pregnancy to be treated *worse* than other disabilities is the same one that will allow the state constitutional freedom to create special *benefits* for pregnant women .... If we can't have it both ways, we need to think carefully about which way we want to have it.[37]

Using that approach, it would appear necessary to agree with the findings of the MCAD concerning Ms. Nathanson's restricted practice. Unless an argument can be made that women are unable to find representation in divorce cases, the fact that Ms. Nathanson believes that women have unique arguments to make, ones that she is either better prepared or more inclined to make, is irrelevant if one is firmly committed to the equal treatment model. A male attorney could just as easily claim, for example, that men are disfavored in custody arrangements, that he is better prepared or more inclined to make the arguments on their behalf, and that he is therefore permitted to restrict his practice to men. In other words, the equality model feminists are fairly likely to accept the parity argument.

B. *Radical Feminist Thought*

On the other hand, the radical feminist school of jurisprudence, often referred to as the antisubordination model,[38] is most likely to reject the parity argument. Whereas the equality model

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36. *See, e.g.*, Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1984) [hereinafter Williams, *Equality's Riddle*]; Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts and Feminism*, 7 WOMEN'S RTS. L. REP. 175 (1982) [hereinafter Williams, *The Equality Crisis*]; Nadine Taub, Book Review, 80 COLUM. L. REV. 1686 (1980). For a discussion of this and other schools of feminist legal thought, see Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1987).

37. Williams, *The Equality Crisis*, *supra* note 36, at 196.

38. *See, e.g.*, CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979); Ruth Colker, *Anti-Subordination Above All: Sex, Race and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986); Ann Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986).

sees women as having been treated dissimilarly from men legally, with a goal of similar treatment, or sameness, the antisubordination model sees women as *not* the same, but rather as different as a result of a history of oppression. Catharine MacKinnon has written:

> Inequality because of sex defines and situates women as women. If the sexes were equal, women would not be sexually subjected. Sexual force would be exceptional, consent to sex could be commonly real, and sexually violated women would be believed. If the sexes were equal, women would not be economically subjected, their desperation and marginality cultivated, their enforced dependency exploited sexually or economically.[39]

The purpose of legal reform, then, for radical feminists, is to restructure law so as to end the oppression of women, rather than attempting to achieve sameness in the eyes of the law. An actual example of the differences between these approaches can be seen in the debate about maternity leave. *California Federal Savings and Loan Association v. Guerra*[40] was a case challenging a California statute that provided maternity leave for women but no comparable leave for men.[41] Feminists were sharply split on this issue and filed amicus briefs on both sides. Equal treatment feminists argued that the statute violated the Pregnancy Discrimination Amendment to Title VII of the Civil Rights Act of 1964, and also took the position that as a matter of policy, feminists should reject special accommodations for women that were not similarly offered to men.[42] On the other hand, antisubordination feminists took the position that realistically women bear the burden of not only pregnancy and childbirth, but the bulk of the care for newborns, and that any government action that offers them protection ought not to be rejected.[43]

Antisubordination feminists presumably would have no trouble justifying Ms. Nathanson's position, whether it was formally described as an attempt at affirmative action or not. Using the ar-

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39. CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 215 (1989).

40. 479 U.S. 272 (1987).

41. The more recent United States Family and Medical Leave Act, 29 U.S.C. § 2601 (1993), mandating a period of unpaid leave for new parents, whether by birth or adoption, and employees needing to care for sick children or elderly parents, is gender neutral, as opposed to the earlier California statute.

42. *See* Williams, *Equality's Riddle, supra* note 36, at 351-70.

43. *See* Linda J. Krieger & Patricia N. Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action, and the Meaning of Women's Equality*, 13 GOLDEN GATE U. L. REV. 513 (1983) (controversy concerning a Montana statute).

gument that women are usually in a worse economic position after a divorce than they were during the marriage,[44] if a woman attorney chooses to use her energy to represent women instead of men, she should be allowed to do that, as her way of redressing what is in any event an inequitable situation.

C. *Cultural Feminism*

Although some overlap exists between all the approaches, a third type of feminist legal analysis, is usually referred to as cultural or different voice feminism.[45] Much of the work in this area has been done as an analysis of the different way women would approach law and the legal system, as opposed to a specific critique of a statute or particular area of law, as the two schools discussed above are more likely to do.[46]

Cultural feminists tend to look at the ways in which women are different, not presumably because of some reliance on genetics or physical characteristics, although the ability to bear children is certainly a physical difference that is reflected in women's approach to any number of issues, including those of law. The emphasis, however, is on the difference in women's experiences, within our culture, and how, as a result of those experiences, women look at legal issues and legal systems in ways that are, by and large, different from the ways that men do. Robin West has written:

> Women are actually or potentially materially connected to other human life. Men aren't. This material fact has existential consequences. While it may be true *for men* that the individual is "epistemologically and morally prior to the collectivity," it is not true for women. The potential for material connection with the other defines women's subjective, phenomenological and existential state, just as surely as the inevitability of material separation from the other defines men's existential state. Our potential for material connection engenders pleasures and pains, values and dangers, and attractions and fears, which are entirely different from those which follow, for men, from the necessity of

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44. *See* WEITZMAN, *supra* note 25, at 323.

45. *See* CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982) (illustrating differences between the way young men and women think); *see also* Martha Minow, *Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987); Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81 (1987).

46. *See, e.g.*, Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3 (1988); Mary Joe Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065 (1985).

separation.[47]

Rather than looking at whether women have achieved formal equality within the legal system regarding the divorce process, or whether the results of divorce tend to continue the oppression of women, cultural feminists would be more likely to look at the way women *experience* divorce within the legal system. If, to oversimplify Carol Gilligan's approach, women are more concerned with relationships, and men are more concerned with rights, then the way each approaches divorce, and, in particular the division of assets and child custody, is likely to be very different.

Given that, Ms. Nathanson's decision to restrict her divorce practice to women is perfectly understandable; she should be treated no differently than a lawyer who specializes in representing tort plaintiffs, unions, or criminal defendants. The issue is not whether she is, in fact, discriminating against men, but whether, having decided to specialize in the issues of concern to women in divorce cases, she would be either wasting her limited resources—in a lawyer's case, the resource in most demand being time—or taking on an issue, rather than a client, she was not fully prepared to represent. Suppose, for example, a lawyer has built his or her practice on the representation of plaintiffs in employment discrimination cases, and that, as a result, the lawyer's clients have consisted of women and people of color. Suppose also that a white male were to approach the lawyer and ask for representation in what is sometimes called a reverse discrimination case, that is, that the employer was trying so hard to hire women or people of color that this person did not get full and fair consideration for a position. If the lawyer turns the case down, using as shorthand that he or she does not represent white males in discrimination cases, what the lawyer would really mean is that he or she does not represent that kind of claim, rather than that kind of person.

Using a cultural feminist approach, it would appear that Ms. Nathanson has built her practice on representing a certain kind of claim in divorce cases, one that is different from the kinds of claims men usually make, and that she is therefore justified in restricting her practice, that it is no more discrimination than it would be to restrict her practice to unions or employers, landlords or tenants, criminal defendants or the state.

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47. Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 14 (1988).

III. THE MCAD DECISION

Obviously, the MCAD did not agree with this analysis. Instead, it held that a lawyer may not refuse to consider requests for representation by persons within a protected class, although apparently a lawyer *may* ultimately refuse to represent a person if he or she feels antipathy to the cause of that potential client, possibly even if that means that the lawyer effectively refuses to represent all people in a protected class after considering their cases. The decision states:

> This ruling does not impinge upon Nathanson's right to devote her practice to furthering the cause of women as she defines that cause. Had Nathanson concluded that the issues raised by Complainant's divorce action were not consistent with her specialty and area of interest and rejected Complainant on that basis, rather than solely because he is a man, the focus of this inquiry would be different. However, Nathanson never inquired into the nature or circumstances of Complainant's divorce case and stated only that she did not represent men in divorce cases.[48]

In other words, had Ms. Nathanson taken up both her time and the Complainant's, interviewed him, and then informed him that she did not feel she could represent him properly, the MCAD probably would not have found in his favor. But because she had a policy of representing only women in divorce cases, she was deemed to be in violation of Massachusetts law. That result would certainly seem to elevate form over substance.

Assuming, however, that the MCAD actually meant what it seems to be saying then it is unlawful discrimination for Ms. Nathanson to restrict her divorce practice to women. The question, then, should be whether Ms. Nathanson is entitled to restrict her practice, or a portion of her practice, to people who have been historically oppressed, whether she announces that policy to potential clients at the outset or screens them first before she turns them down.

As discussed above, some feminist legal scholars are attracted to the parity argument, and would be likely to agree with the MCAD, assuming that other arguments regarding whether we should indeed treat the lawyer/client relationship as a place of public accommodation are not persuasive. On the other hand, radical

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48. Stropnicky v. Nathanson, 19 M.D.L.R. (Landlaw, Inc.) 39, 41 (MCAD Feb. 25, 1997).

feminists would argue that women have been oppressed over the years, indeed, that women have been *particularly* oppressed by the economic effects of divorce,[49] and that it is therefore perfectly acceptable for a woman attorney to choose to devote her energies to attempting to redress that imbalance by representing only women in divorce cases. Finally, cultural feminists would presumably agree with the argument regarding the effect of divorce on women.[50] In addition, they would also be likely to see women's *needs* in the context of divorce cases as different, and therefore justifying a decision to concentrate on representing those needs as opposed to others.

CONCLUSION

By applying a kind of formal equality, insisting that discrimination against men is legally no different than discriminating against women, the MCAD is, I believe, neither correctly following legal precedent nor, normatively, showing any understanding of the difference in the experiences of women, particularly in the context of divorce. Although Ms. Nathanson distinguishes the kinds of clients she chooses to represent by gender, at least in one part of her practice, she does so, presumably, in order to engage in a particular form of specialization, rather than because of gender-based animus. That decision should be treated no differently than other choices to specialize, to represent unions, criminal defendants, or civil rights plaintiffs. The MCAD's conclusion to do otherwise is neither compelled by legal precedent, nor, I would argue, should it be compelled by feminist legal theory.

49. *See* WEITZMAN, *supra* note 25, at 323.

50. *See, e.g.*, MARTHA ALBERTSON FINEMAN, THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM (1991).